BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DUANE THORNTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 193,567
PREMIER WINE & SPIRITS, INC.	)	
Respondent	)	
AND	)	
	)	
CNA INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the Award dated March 19, 1997, entered by Administrative Law Judge Robert H. Foerschler. On September 16, 1997, the Appeals Board heard oral argument.

APPEARANCES

Alvin E. Witwer of Kansas City, Kansas, appeared for the claimant. Timothy G. Lutz of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The parties' stipulations and the record are listed in the Award.

ISSUES

Claimant injured his back at work on July 22, 1994. The Administrative Law Judge awarded claimant permanent partial general disability benefits for a 50.5 percent work disability. In reaching that decision, the Judge found claimant had a 100 percent wage loss because he was unemployed. Also, the Judge found claimant's average weekly wage was $260 and that claimant was entitled to one week of temporary total disability benefits. The issues now before the Appeals Board on this review are (1) What amounts, if any, should be included in claimant's average weekly wage for overtime and fringe benefits; (2) did claimant prove he is entitled to any temporary total disability benefits and, if so, how many weeks; and (3) what is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) The claimant, Duane Thornton, injured his back on July 22, 1994, while lifting a case of beer. The parties stipulated that the accidental injury arose out of and in the course of Mr. Thornton's employment as a delivery truck driver with Premier Wine & Spirits, Inc.

(2) For his back injury, Mr. Thornton obtained various treatments, including chiropractic, pain medications, physical therapy, work hardening, a TENS unit, and epidural injections.

(3) From November 14, 1995, through March 25, 1996, board-certified orthopedic surgeon Jeffrey T. MacMillan, M.D., treated Mr. Thornton. As confirmed by x-rays and an MRI, the doctor diagnosed lumbar disk herniations at the L4-5 and L5-S1 intervertebral levels. The doctor, however, did not believe the herniations were compressing or displacing the nerve roots. When he released Mr. Thornton from treatment in March 1996, the doctor recommended Mr. Thornton should never lift greater than 50 pounds and should limit repetitive lifting and carrying to 25 pounds. Although Mr. Thornton's job at Premier would technically fit within those permanent medical restrictions, the doctor did not think it would be prudent to return to that work. Using an unidentified edition of the AMA Guides to the Evaluation of Permanent Impairment, Dr. MacMillan found Mr. Thornton had a 10 percent whole body functional impairment, 7 percent of which the doctor believed preexisted the July 1994 accident.

(4) Mr. Thornton's attorney sent him to Nathan Shechter, M.D., for a July 1996 evaluation. Dr. Shechter also diagnosed herniated lumbar disks at the L4-5 and L5-S1 interspaces and believes Mr. Thornton may eventually require back surgery. Using the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment, the doctor found Mr. Thornton had a 17 percent whole body functional impairment. He believes Mr. Thornton should be restricted from lifting more than 20 pounds; frequent lifting or carrying more than 10 pounds; prolonged weightbearing, pushing, or pulling; and performing work beyond that considered light duty as defined by the Department of Labor's Dictionary of Occupational Titles.

(5) Considering the opinions of both Drs. MacMillan and Shechter, and giving them approximately equal weight, the Appeals Board finds Mr. Thornton has a 14 percent whole body functional impairment as a result of his back injury.

(6) Mr. Thornton worked for Premier until being terminated on December 1, 1995. He was told Premier could no longer accommodate light-duty work restrictions. And he has not worked anywhere since.

(7) Between April and October 1996, Mr. Thornton received unemployment benefits. During that period, he actively sought work in the Kansas City area. But when the benefits terminated, so did his job search. When he testified at the regular hearing on

December 10, 1996, he had contacted only one or two potential employers after the unemployment benefits had ceased two months before.

(8) Mr. Thornton has a GED and has obtained training as both a carpenter and a cook in the Job Corps. He has also served in the military where he obtained training as a truck driver, warehouse worker, and forklift operator. In addition to being a delivery truck driver with Premier, he has work experience as a school bus driver, printing plant warehouse worker, dishwasher, line cook, service station assistant manager, and fast food assistant manager.

(9) The parties stipulated that on the date of accident Mr. Thornton was earning $260 per week, excluding overtime and fringe benefits. At oral argument before the Appeals Board, the parties agreed that $21.38 in weekly overtime should be included in the average weekly wage computation. As indicated by the wage statement introduced at the regular hearing, Premier provided life and medical insurance coverage with a weekly value of $30.21. Mr. Thornton testified the insurance coverage continued through March 1996. The wage statement also indicates Premier paid Mr. Thornton $279 in bonuses for the six-month period before his July 1994 accident for an average of $10.73 per week.

(10) In October 1996, vocational rehabilitation consultant Michael J. Dreiling, who is the director of the Menninger Return to Work Center, met with Mr. Thornton to analyze and develop a list of former job tasks and review his efforts to find work. Mr. Dreiling believes Mr. Thornton has the ability to return to work as either a school bus driver or a cook and earn approximately $6.50 per hour. After reviewing Mr. Thornton's efforts to find employment, Mr. Dreiling suggested that he avoid discussing his medical restrictions with potential employers unless the job would actually exceed them. The Appeals Board finds Mr. Dreiling's opinions persuasive and finds Mr. Thornton retains the ability to earn $260 per week.

(11) Dr. Shechter testified Mr. Thornton had lost the ability to perform 50 percent of his former job tasks. Unfortunately, the doctor was not aware of the specific job tasks that comprised each job that Mr. Thornton had performed in the 15-year period before the July 1994 accident.

(12) Dr. MacMillan reviewed the task analysis prepared by Mr. Dreiling and testified that Mr. Thornton had lost the ability to perform 15 percent of his former job tasks. That opinion is persuasive and adopted by the Appeals Board as its finding of task loss.

CONCLUSIONS OF LAW

(1) As the Administrative Law Judge indicated, the request for temporary total disability benefits is not supported by the record. Although Mr. Thornton testified he was taken off work on occasion, the evidence fails to establish the periods he was temporarily and completely unable to engage in any substantial, gainful employment. *See* K.S.A. 44-510c. Therefore, the request for temporary total disability benefits should be denied.

The Administrative Law Judge considered medical reports introduced at the preliminary hearing to justify awarding one week of temporary total disability benefits. But those medical reports were neither entered nor stipulated into the evidentiary record for purposes of final award and, therefore, cannot be considered because they were not supported by the testimony of the doctor who wrote them. *See* K.S.A. 44-519 and K.A.R. 51-3-5a.

(2) For the period from the date of accident on July 22, 1994, through March 31, 1996, the average weekly wage is $292.11, which is comprised of $260 per week for regular time, $21.38 per week for overtime, and $10.73 per week for bonus. After Premier discontinued the life and medical insurance coverage, the weekly value of those benefits, $30.21, is then included in the computation. Therefore, for the period commencing April 1, 1996, the average weekly wage is $322.32.

(3) Because his is an "unscheduled" injury, Mr. Thornton's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The above statute, however, must be read in context with the principles set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), that require a worker to make a good faith effort to find appropriate employment before the actual difference in pre- and post-injury wages can be used in the permanent partial general disability formula.

While he drew unemployment benefits, Mr. Thornton looked for employment. But when the unemployment benefits stopped, his efforts to find work decreased to such an extent that he had essentially stopped looking. Therefore, the Appeals Board finds that the actual difference in pre- and post-injury wages should be used for the period until October 1, 1996, when an imputed wage should be utilized as required by Copeland. As found above, Mr. Thornton retains the ability to earn $260 per week.

From the date of accident through September 30, 1996, Mr. Thornton had an actual 100 percent difference in wages. Imputing a $260 weekly wage and comparing it to a $322.32 average weekly wage yields a 19 percent wage difference for the period commencing October 1, 1996.

As required by statute, the Appeals Board averages the 100 percent and 19 percent wage loss percentages with the 15 percent task loss and finds that Mr. Thornton has a 58 percent permanent partial general disability through September 30, 1996, and after that date a 17 percent permanent partial general disability.

Premier contends the permanent partial general disability benefits should be reduced by 7 percent, the amount of preexisting functional impairment that Dr. MacMillan believed Mr. Thornton possessed before the July 1994 accident. K.S.A. 44-501(c) provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The Appeals Board, however, finds that statute is not applicable here. First, because Dr. MacMillan did not have any of Mr. Thornton's prior medical records, the doctor's opinion regarding preexisting impairment is conjecture and entitled little weight. Second, the Appeals Board finds Mr. Thornton was not functionally impaired before the July 1994 accident. His testimony is uncontroverted that he did not have any back problems before that accident. Likewise, the record fails to establish that Mr. Thornton's back restricted or impaired him in any discernable manner before the work-related accident.

The Appeals Board finds K.S.A. 44-501(c) was intended to prevent the pyramiding of benefits when an impaired worker suffers a later injury. The statute is not applicable when a worker has an unknown, asymptomatic condition that neither disables nor restricts nor impairs that individual in any manner.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated March 19, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Duane Thornton, and against the respondent, Premier Wine & Spirits, Inc., and its insurance carrier, CNA Insurance Companies, for an accidental injury which occurred July 22, 1994. For the period July 22, 1994, through March 31, 1996, claimant is entitled to 88.29 weeks at the rate of

$194.75 based on an average weekly wage of $292.11, or $17,194.48, followed by 26.14 weeks for the period from April 1, 1996, through September 30, 1996, at the rate of $214.89 based on an average weekly wage of $322.32, or $5,617.22, for a 58% permanent partial general disability, making a total of $22,811.70. For the period beginning October 1, 1996, claimant's permanent partial general disability decreases to 17%, or a maximum of 70.55 weeks. Therefore, there are no additional weeks due and owing for the period commencing October 1, 1996, and claimant's total award is $22,811.70, which is all currently due and owing and ordered paid in one lump sum less amounts previously paid.

Claimant may request additional medical benefits in a proper application filed with the Director.

The remaining orders set forth in the Award are adopted to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Alvin E. Witwer, Kansas City, KS
Timothy G. Lutz, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director